

NO. 46776-3-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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Richard Severson,

Petitioner,

v.

State of Washington,  
Department of Social and Health Services,  
Respondent.

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**DSHS' RESPONSE IN OPPOSITION TO APPEAL**

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## **I. INTRODUCTION**

Petitioner, Richard Severson, appeals a Pierce County Superior Court Order upholding the decision of the Department of Social Health Services' (DSHS or Department) Board of Appeal (BOA) decision that he negligently treated or maltreated his ten-month-old son, and denying his appeal of that decision. Mr. Severson has failed to establish that the Superior Court's decision should be disturbed. Mr. Severson has not shown that the Superior Court committed obvious or probable error or substantially departed from the usual course of judicial proceedings by upholding the BOA decision and denying his appeal of that Order.

## **II. FACTS**

### **A. Statement of the Proceedings**

This appeal involves a finding by DSHS that the Petitioner, Richard Severson, negligently treated or maltreated his son then-nine-month-old son, Christian. (BOA Review Decision [hereinafter, RV DEC] pg. 1) Written notice of the finding was sent to Mr. Severson on February 4, 2011; he signed for receipt of the certified letter on April 19, 2011. (RV DEC 1) Mr. Severson requested internal review, and the Department upheld the finding on May 2, 2011; he signed for receipt of the certified letter on May 5, 2011. (RV DEC 1)

An administrative hearing was held before Administrative Law Judge (ALJ) Drew Henke on October 1, 2012, on Mr. Severson's further

challenge of the finding. (RV DEC 1) The ALJ issued an Initial Order reversing the Department's finding on December 7, 2012.<sup>1</sup> (RV DEC 1)

The Department filed a Petition for Review to the BOA on January 4, 2013. (RV DEC 1) BOA Review Judge (RV Judge) James Conant issued a Review Decision and Final Order vacating the ALJ's Initial Order and reinstating the negligent treatment or maltreatment finding on April 19, 2013.<sup>2</sup> (RV DEC 1-26)

Mr. Severson then appealed the BOA decision. A hearing on the appeal was held before Pierce County Superior Court Judge Stephanie A. Arend, on September 12, 2014. (Report of Proceedings [hereinafter, RP] 1-33) The Court heard and considered oral argument and briefs of the parties. At the end of the hearing, the Court upheld the BOA decision and denied Mr. Severson's appeal. (RP 30, 31)

Mr. Severson now seeks appeal of the Superior Court decision.

#### **B. Statement of the Facts**

Richard Severson is the father of Christian, born February 2, 2010. Christian's mother is Cary Floyd. (RV DEC 2)

On December 21, 2010, the Department received a referral from a Social Worker (SW) at Good Samaritan Hospital, making a mandated report of suspected child abuse and/or neglect. (RV DEC 2) Ms. Floyd

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<sup>1</sup> ALJ Henke also issued an order denying Mr. Severson's Motion to Dismiss and Request for Fees on December 7, 2012.

<sup>2</sup> The BOA RV Judge also denied reconsideration of its Order, on Mr. Severson's request for reconsideration, on May 29, 2013.

and Christian had been seen in the emergency room for injuries sustained in a physical altercation between Ms. Floyd and Mr. Severson earlier that day on a city street. (RV DEC 2) During the altercation, then nine-month-old Christian sustained a 2cm contusion/hematoma (bruise) on his forehead. (RV DEC 2-3, 5, 6) Ms. Floyd was able to call 911, and police and paramedics responded. (RV DEC 2-4) Police interviewed Ms. Floyd at the scene and took pictures of several injuries on her. (RV DEC 6-7) Paramedics also observed Ms. Floyd's injuries, as well as the bruise on Christian's forehead. (RV DEC 4, 6-7) Ms. Floyd and Christian were transported by ambulance to the Good Samaritan Hospital emergency room. (RV DEC 6-7, 21) Police contacted Mr. Severson at the couple's trailer, which was a short distance away from where the altercation had occurred. (RV DEC 2, 4, 7) Police did not observe injuries on Mr. Severson. (RV DEC 7) Police arrested and took Mr. Severson into custody for domestic violence assault. (RV DEC 2, 3, 5, 6)

At the emergency room, further injuries were noted on Ms. Floyd than what had been observed by the police and paramedics at the scene. (RV DEC 7) Additionally, Ms. Floyd was interviewed by a hospital social worker. (RV DEC 2) That social worker assisted in getting Christian and his mother into a domestic violence (DV) shelter and gave Ms. Floyd resource information to file for a protection order. (RV DEC 2)

DSHS SW Debi Luckhurst was assigned to investigate the referral. (RV DEC 3) SW Luckhurst interviewed: Ms. Floyd at the domestic violence shelter (RV DEC 3); Mr. Severson at the Pierce County Jail (RV

DEC 5); and a SW at the Family Support Center (RV DEC 5-6). SW Luckhurst also reviewed the Hospital records on Christian and Ms. Floyd. (RV DEC 2, 6) SW Luckhurst took pictures of Christian's head injury and also reviewed those taken by the police and hospital. (RV DEC 3, 6-7) SW Luckhurst reviewed the full police report, which included the interviews of Mr. Severson and Ms. Floyd, (RV DEC 6) In closing her investigation, and the case, SW Luckhurst made a finding that Mr. Severson had negligently treated or maltreated Christian, but did not make a finding that he had physically abused his son. (RV DEC 7-8)

At the administrative hearing, Mr. Severson appeared and was represented by an individual of his own choosing, Jacquie Darby, a paralegal. (RP 5-6; Administrative Hearing RP [hereinafter, AH RP] 1, 10; ALJs Initial Order [hereinafter, IO] 1) The Department was represented by Special Assistant Attorney General David Brown (AH RP 1; IO 1). The Department and the Appellant had exhibits admitted. (AH RP 3-4) Ms. Darby initially objected to only one of the Department's proposed exhibits, a picture, but then did not object when the Department's witness identified the photograph and moved for its admission. (AH RP 13, 30-31) Mr. Severson testified, giving his version of the incident, and that he was the victim, not Ms. Floyd. (AH RP 46, 49-50, 53, 54) Mr. Severson confirmed Christian was caught in the middle of the altercation, and that the infant hit his head on the pavement. (AH RP 53) Mr. Severson representative, Ms. Darby, also had the opportunity to

question the Department's only witness, SW Luckhurst, and did so. (AH RP 36-45)

ALJ Drew Henke issued an Initial Order reversing the Department's finding that Mr. Severson negligently treated or maltreated Christian and remanded the matter to the Department to change the finding to unfounded. (RV DEC 1; IO 12) Because Ms. Floyd did not testify at the administrative hearing, the ALJ found this unduly prejudiced Mr. Severson because he did not have an opportunity to confront her. (IO 8) As such, the ALJ did not afford any weight to hearsay statements made by Ms. Floyd to the police, Hospital SW, or SW Luckhurst. (IO 9) The Department appealed the Initial Order. (RV DEC 1)

BOA RV Judge James Conant vacated the ALJ's Initial Order and reinstated the Department's negligent treatment or maltreatment finding against Mr. Severson. (RV DEC 26) Contrary to the ALJ, the BOA RV Judge did weigh and consider Ms. Floyd's statements. (RV DEC 15-21) The RV Judge compared Ms. Floyd's statements, and the numerous pictures, with Mr. Severson's statements to the police and SW Luckhurst. (RV DEC 21) In his statements, Mr. Severson maintained he was the victim: he was not surprised Christian had sustained a bruise on his temple area and it happened while he was holding, or had control of, Christian during the altercation with Ms. Floyd. (RV DEC 5; IO 50, 53)

In determining corroboration and credibility, the RV Judge further considered that Ms. Floyd and Christian went into a DV shelter directly from the hospital. (RV DEC 2, 3, 8, 17) Ms. Floyd filed a protection

order against Mr. Severson covering her and Christian. (RV DEC 4, 7) SW Luckhurst had also made contact with “Cheryl” at the Family Support Center in Sumner, at Mr. Severson’s request. (RV DEC 5) Cheryl advised that Mr. Severson is very controlling and demeaning to Ms. Floyd, which causes her to “shut down.” (RV DEC 5) Cheryl believed Ms. Floyd needed to remain engaged in DV services. (RV DEC 5)

The BOA RV Judge determined that Ms. Floyd’s statements to the Hospital SW fell within the ER 803(a)(4) exception to the hearsay rule. (RV DEC 20-21) As such, these statements could be used as the sole basis for entry of findings of fact as to what actually occurred leading up to and during the December 21, 2010, altercation. (RV DEC 21) Additionally, the RV Judge found that Ms. Floyd’s hearsay statements were corroborated: blood observed on her at the scene was consistent with her statements to the police; she and Christian were transported to the emergency room due to injuries; and pictures of the injuries taken by the police, hospital, and SW Luckhurst were consistent with Ms. Floyd’s statements. (RV DEC 21) Consistent throughout all reports of the incident – including Mr. Severson’s own statements and testimony at the administrative hearing – was that Mr. Severson had control over Christian throughout the incident and the infant’s injury happened during the altercation. (RV DEC 9-10)

Mr. Severson then appealed the BOA RV Judge’s decision. (RP 1) On September 12, 2014, a hearing on Mr. Severson’s appeal was held before Pierce County Superior Court Judge Stephanie A. Arend. (RP 1-

33) As the party challenging the Department's action, Mr. Severson bore the burden of proving the invalidity of the BOA RV Judge's Review Decision and Final Order. (RV DEC 2) The Superior Court found Mr. Severson did not meet this burden. (RV DEC 30, 31) Rather, the Superior Court found that the BOA RV Judge committed no errors of law and the factual findings were supported by substantial evidence. (RV DEC 30) As such, the Superior Court denied Mr. Severson's appeal. (RV DEC 30, 31)

Mr. Severson now appeals the Superior Court's decision.

### **III. ARGUMENT**

#### **A. Mr. Severson Has Failed to Establish That The Superior Court's Decision Should Be Disturbed.**

Mr. Severson's Petition for Judicial Review of the BOA decision was his appeal as of right. This further appeal is then a request for discretionary review of the Superior Court's decision. Mr. Severson has not established that this case meets the criteria of RAP 2.3 required for this court to accept review of the Superior Court's decision. Mr. Severson has not shown that: (1) the superior court committed obvious error which would render further proceedings useless; or (2) the superior court has committed probable error and its decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) the superior court has so far departed from the accepted and usual course of judicial

proceedings as to call for discretionary review by the appellate court. These three factors are, however, the governing factors under the express provisions of RAP 2.3.

**B. The Superior Court Did Not Commit Obvious Or Probable Error And Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings By Upholding the BOA Decision And Denying Appeal Of That Decision.**

Superior Court Judge Arend did not commit obvious or probable error or depart from the accepted and usual course of judicial proceedings by upholding the BOA RV Judge's decision that Mr. Severson had negligently treated or maltreated his then-ten-month-old son, Christian, and that his appeal of that decision should be denied.

The standard of review applicable to the order at issue is abuse of discretion. *In re Dependency of T.L.G.*, 139 Wn. App. 1, 156 P.3d 222 (2007); *In re Welfare of J.H.*, 75 Wn. App. 887, 894 P.2d 1030 (1994). An abuse of discretion exists only when no reasonable person would take the position adopted by the court. *Griggs v. Averbeck Realty*, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979). The decision of the court must be "manifestly unreasonable." *Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). So long as the record provides a legitimate basis for the trial court's decision, then an abuse of discretion has not occurred.

In the absence of a showing “obvious or probable error pursuant to RAP 2.3, such appeals are discouraged because they frustrate the goals of judicial economy and efficiency.” *See, State v. Brown*, 64 Wn. App. 606, 617, 825 P.2d 350 (1992). These goals are of paramount concern and preclude the review of orders implicating even constitutional rights when probable or obvious error has not been demonstrated. *In re Dependency of M.A.*, 66 Wn. App. 614, 621, 834 P.2d 627 (1992).

In reviewing the BOA decision, Superior Court Judge Arend correctly applied the standards of the Administrative Procedure Act directly to the record before the agency. *See, Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494, 497 (1993); *Ruland v. DSHS*, 114 Wn. App. 263, 272, 182 P.3d 470 (2008); *Aponte v. DSHS*, 92 Wn. App. 604, 615, 965 P.2d 626 (1998). *See also, Waste Mgt. Of Seattle, Inc. v. Utilities and Transportation Comm’n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

Questions of law were correctly reviewed by the Superior Court de novo, by independently determining the applicable law and applying that law to the facts as found by the BOA RV Judge. *See, Ongom v. Dep’t of Health*, 159 Wn.2d 132, 137, 148 P.3d 1029 (2006), *cert denied* 550 U.S. 905, 127 S. Ct. 2115, 167 L. Ed. 2d 815 (2007); *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982). Questions of

fact were correctly reviewed according to the “substantial evidence” test set forth in the Administrative Procedure Act, RCW 34.05.570(3)(e). *See, Brown v. DSHS*, 145 Wn. App. 177, 182, 185 P.3d 1210 (2008); *Olmstead v. Dep’t of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991).

The Superior Court did not try the facts de novo. *See, Jerome v. State Employment & Security Dep’t*, 69 Wn. App. 810, 814, 850 P.2d 1345 (1993). Nor did the Superior Court weigh witness credibility, reweigh the evidence, including the weight to be given reasonable but competing inferences, or substitute its judgment for the agency’s findings of fact; *Brown v. DSHS*, 145 Wn. App. 177, 182, 185 P.3d 1210 (2008); *Kraft v. DSHS*, 145 Wn. App. 708, 717, 187 P.3d 798 (2008); *Costanich v. Dep’t of Soc. & Health Servs.*, 138 Wn. App. 547, 556, 156 P.3d 232 (2007); *Affordable Cabs, Inc. v. Employment Sec. Dep’t*, 124 Wn. App. 361, 101 P.3d 440 (2004).

The Superior Court had the authority to reverse the Department’s adjudicative decision if: (a) the agency erroneously interpreted or applied the law; or (b) the agency’s decision was not supported by substantial evidence in the record. RCW 34.05.570(3).

The facts demonstrate; there is no basis to disturb Superior Court Judge Arend’s Order upholding the BOA decision, and denying Mr. Severson’s appeal of that decision. Mr. Severson does not cite to RAP

2.3(b). He does not identify any grounds under which discretionary review is appropriate. Rather he reiterates the arguments made in his appeal to the Superior Court.

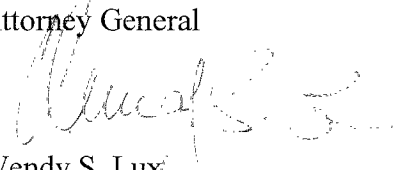
As the petitioner, Mr. Severson does not meet his burden of demonstrating how the Superior Court's decision qualifies for review pursuant to RAP 2.3(B)(1), (2) or (3). *See* RAP 17.3(b)(6) (requiring the moving party to provide argument as to why discretionary review should be granted). Accordingly, this appeal must be denied.

#### IV. CONCLUSION

Mr. Severson has failed to establish a basis for disturbing the Superior Court's Order in this case, under RAP 2.3. Accordingly, Mr. Severson's appeal should be denied.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of June, 2015.

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DECLARATION OF SERVICE

I, Christina M. Hacker, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On June 26, 2015, I caused a true and correct copy of the DSHS' Response in Opposition to Appeal to be filed electronically with the Court of Appeals, Division II, and to be served via regular US Postal Service mail as indicated below:

Richard Severson  
PO Box 1068  
Enumclaw, WA 98022

SIGNED in Tacoma, Washington, this 26<sup>th</sup> day of June, 2015.

A handwritten signature in cursive script, appearing to read 'cmhacker', is written over a horizontal line.

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# WASHINGTON STATE ATTORNEY GENERAL

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